IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

(1) RSA No. 17 of 1995
And
(2) RSA No. 21 of 1995

Judgment reserved on 30.5.2006

Date of decision : 6.6.2006

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(1) Suraj **…Appellant.**

Versus

Dalip Singh alias Kuldeep Singh **…Respondent.**

(2) Suraj **…..Appellant.**

Versus

Dalip Singh & others **…. Respondents.**

Coram

The Hon'ble Mr. Justice : **Surjit Singh, Judge.**

Whether approved for reporting? Yes

For the appellant: Mr. G.D. Verma, Sr. Advocate, with Mr. Romesh Verma, Advocate.

For respondents : Mr. R.K. Gautam, Sr. Advocate, with Mr. Anurag Sharma, Advocate, for respondent Dalip Singh.

Surjit Singh, Judge

This judgment shall dispose of these two appeals, because similar questions of law and facts are involved and the contesting parties are also the same in both the cases.

2. Both the appeals have been filed by Suraj Ram, who was

Whether reporters of Local Papers may be allowed to see the Judgment? Yes

defendant in Civil Suit No. 200 of 82 / RBT 192 of 88, that had been filed by late Smt. Parvati, who on her death was substituted by Dalip Singh, respondent and plaintiff in Civil Suit No. 70 of 1986, which he himself filed against respondent Dalip Singh. The suit filed by late Smt. Parvati was tried and decided by one Civil Court at Palampur, while the suit filed by appellant Suraj Ram was tried and decided by another Civil Court, stationed at the same place. It appears that nobody bothered to bring it to the notice of the two Courts that two Civil Suits between the parties were there and they needed to be consolidated or at-least tried simultaneously.

3. In the suit, which was filed by late Smt. Parvati and which was earlier in point of time, declaration was sought that said Smt. Parvati was a co-sharer to the extent of half share with the appellant and other respondents in respect of 4-35-34 Hectare land, described in the plaint and that the remaining half belonged to appellant / defendant Suraj Ram and that she was entitled to get her share separated by partition. It was also alleged that the plaintiff (Smt. Parvati) was the widow of one Khalela, who was a real brother of Ram Dayal, the father of the present appellant / defendant and that the father of the appellant / defendant and the husband of Smt. Parvati inherited the suit land from their father, in equal shares, and that on the death of Khalela, plaintiff (Smt. Parvati) inherited his share and thus she was owner to the extent of half share.

4. The suit was contested by the appellant. He alleged that in the year 1927 plaintiff (Smt. Parvati) had filed a suit seeking partition of her share and in that suit there was a compromise between the parties on 19.11.1927 and in terms of that compromise, the plaintiff (Smt. Parvati), out of 56 Kanals of land, falling to her share and in her possession, had

surrendered possession of 24 Kanals in favour of appellant's father Ram Dayal, who agreed to discharge her debts from the income of that 24 Kanals land and the remaining 32 Kanals land was left with the plaintiff with the clear stipulation that she would have the life interest therein and that she would not have any right to alienate that property or even to create a charge thereon. It was further stated that in case the aforesaid plea was not established, he being in possession and his possession being open, hostile, uninterrupted and continuous, he had acquired title by prescription. Certain preliminary objections like the plaintiff being estopped to file the suit, the suit being barred by time, the suit being bad for non-joinder of necessary parties, revenue entries showing the plaintiff as joint owner to the extent of one-half share being wrong, the plaintiff having no locus standi to sue and the suit being bad for mis-joinder of other persons as co-defendants, were also taken.

5. Various issues were framed on the pleadings of the parties and ultimately, vide judgment dated 31.12.1986, the trial Court held that the plaintiff had one-half share in the suit land and she was entitled to get her share separated by way of partition. Defendant's plea that the plaintiff had surrendered any portion of the property pursuant to the compromise of 1927 or that the property, which remained in her possession was also held by her only for life, were rejected. Issues based on various preliminary objections, raised in the written statement, were also found against the appellant / defendant. Consequently the suit was decreed.

6. Appellant / defendant filed an appeal in the Court of the learned District Judge. The learned District Judge, vide judgment dated 3.9.1992, accepted the appeal, set aside the judgment and decree of the

trial Court and remanded the case by framing an additional issue, which reads as under:-

> "Whether Smt. Parvati executed a valid will of the suit land in favour of Dalip Singh, plaintiff, if so, its effect? OPP"

The first appellate Court directed in the order of remand that after affording due opportunity to the parties to lead evidence on the additional issue, the matter be decided afresh. The parties then led evidence on the aforesaid issue before the trial Court. Finally, the trial Court, vide judgment dated 17.8.1993, held that the plaintiff was entitled to half share in the suit land, deceased plaintiff Parvati had executed a will in favour of respondent Dalip Singh, who had been substituted as her legal representative. Other issues were also found in favour of the plaintiff / respondent. Consequently the suit was decreed.

7. The appellant again filed an appeal. The first appellate Court dismissed the appeal holding that though there had been a compromise in the year 1927 in the partition proceedings, instituted by Smt. Parvati and another compromise in the proceedings for partition instituted by Smt. Parvati again in the year 1945, yet by neither of the two compromises she relinquished any part of the property falling to her share, in favour of appellant's father and that she having remained in constructive possession of that part which she gave to the father of the defendant for discharge of her debts and physical possession of that part retained by her, her life estate had ripened into full ownership by coming into force of the Hindu Succession Act. The first appellate Court also upheld the finding that Smt. Parvati made a will in favour of respondent Dalip Singh and so he had succeeded to the suit property. Consequently the appeal was dismissed.

8. The other suit was filed by appellant Suraj in the year 1986, after the death of Smt. Parvati. In that suit a declaration was sought that the appellant was owner in possession of the entire suit land and that on the death of Smt. Parvati, her share in the suit land, as per revenue entries, had devolved upon him, he being the son of a real brother of the husband of Smt. Parvati. It was alleged that defendant / respondent Dalip Singh had started asserting that the suit land had devolved upon him on the basis of a will dated 2.6.1980, executed in his favour by Smt. Parvati, but that was not correct and that as a matter of fact, Parvati did not execute any will nor did she possess sound disposing mind at the relevant time. It was also alleged that the will was the result of fraud and mis-representation. In the alternative it was stated that the parties were Rajput by caste and they being agriculturists, were governed by custom in the matter of succession and according to the custom, applicable to the parties, will could not have been executed in respect of the suit property, as the same was ancestral property in the hands of Smt. Parvati.

9. Respondent Dalip Singh, who was impleaded as defendant, contested that suit. He pleaded that Smt. Parvati had executed a will in his favour. He denied that any fraud was played upon or mis-representation was made to Smt. Parvati by him to get the will executed in his favour. It was also denied that the property was ancestral or the parties were governed by custom or that according to the custom, will could not have been made. It was alleged that on the death of Smt. Parvati, the respondent / defendant had occupied her share in the suit land. Certain preliminary objections were raised. The trial Court found all the material issues in favour of the respondent / defendant and consequently dismissed

the suit. An appeal was filed in the Court of learned District Judge by the appellant / plaintiff and the same was dismissed.

10. The appellant has now come to this Court. He seeks the reversal of the findings that Smt. Parvati was owner to the extent of one-half share in the suit land. He also seeks reversal of the finding returned by the two Courts below that Smt. Parvati made a valid will in favour of respondent Dalip Singh.

11. RSA. No. 17 of 1995 was admitted on the following substantial questions of law:-

1. Whether the courts below have mis-construed the compromise exhibit PW/8/A which took place on 19.11.1927 which has resulted into erroneous and illegal conclusions?
2. Whether the evidence in support of proof of will in the earlier instituted suit between the parties can be made base for determining the validity of will in a subsequent suit?
3. That whether the parties to the suit were governed in the matter of alienation of land by customary rights of Kangra District and no valid will could be executed in favour of the respondent according to this customary right?
4. Whether the alienation of ancestral property by way of a will by late Smt. Parwati to stranger is invalid?
5. Whether the appellant is legal heir of late Smt. Parwati with respect to property in suit?
6. Whether the suit has been decided by receiving and considering in-admissible evidence?
7. Whether the oral and documentary evidence produced by the appellant has been ignored?

12. RSA No. 21 of 1995 was admitted on these substantial questions of law:-

1. Whether the courts below have mis-construed the compromise exhibit D-2 which took place on 19.11.1927 which has resulted into erroneous and illegal conclusions?
2. Whether in the partition proceedings before a Revenue Officer, if a co-sharer gives up portion of his or her share, the person in whose favour that share is given up becomes absolute owner thereof?
3. Whether Will as set up by respondent No. 1 is surrounded by suspicious circumstances and the same is not legal and valid having been procured by respondent by his active participation and by exercising undue influence?
4. Whether the parties to the suit were governed in the matter of alienation of agriculture land ancestral in character is governed by the customary rights of Kangra?
5. Whether Smt. Parvati could not alienate the property in suit by way of Will in view of the bar under the customary rights of Kangra?
6. Whether the appellant being legal heir of Smt. Parvati has succeeded her with respect to the properties in suit?
7. Whether the oral and documentary evidence has been mis-appreciated by the Courts below?
8. Whether the documentary evidence on the basis of which suit has been decreed has been dis-credited and the presumption of truth attached to the revenue record has rebutted by the compromises which took place between Smt. Parvati and the appellant in the years 1927 and 1945?

On 30.5.2006, the following additional substantial question of law was framed in RSA No. 21 of 1995 during the course of final hearing:-

> Whether the two Courts below could not have returned the finding that Parwati made a valid Will in favour of respondent Dalip Singh, when no such plea had been raised by said Dalip Singh in his pleadings?

13. Learned counsel for the appellant started with the submission that the finding, recorded by the two Courts below, in the suit instituted by late Smt. Parvati, that she had made a valid will in favour of respondent Dalip Singh, who was substituted as plaintiff in her place, is unsustainable, inasmuch as no plea had been raised in that suit that Smt. Parvati had made any will. He further submitted that though an issue, pertaining to the will, was framed by the learned District Judge, while disposing of the appeal against the initial decision, rendered in that suit and the case was remanded to the trial Court with the direction that the said issue be tried and the matter decided afresh, as a matter of fact, there was no averment either in the plaint or the replication that Smt. Parvati had made any will in favour of Dalip Singh and so the very framing of the issue was illegal and hence the finding, recorded on that issue by the two Courts below, is no finding in the eyes of law. As regards the finding of the two Courts below regarding the same will in the other suit, which was filed by appellant Suraj Ram, wherein the will was specifically challenged, the learned counsel for the appellant submitted that no evidence had been led in that case to prove the execution of the will and hence the finding, recorded in that suit by the trial Court and affirmed by the appellate Court, is also unsustainable. He submitted that if the finding about the issue pertaining to the will is ignored

from the judgments, rendered by the trial Court and the first appellate Court in the two cases, there cannot be any escape from the acceptance of the two appeals and the consequential dismissal of the suit filed by Smt. Parvati and the decreeing of the suit filed by appellant Suraj Ram.

14. It is true that in the suit that was filed by Smt. Parvati neither side raised the plea of execution of will by Smt. Parvati in favour of Dalip Singh. Smt. Parvati filed the suit seeking declaration that she was owner to the extent of half share in the suit land. The suit was filed by her in the year 1982. Appellant Suraj Ram, who was impleaded as defendant, contested the suit, as already noticed. During the pendency of that suit, Smt. Parvati died. Respondent Dalip Singh made an application for being substituted as plaintiff. He claimed that Smt. Parvati had executed a will in his favour and on the strength of that will, he had stepped into her shoes and was entitled to continue the suit and if the same was decreed to enjoy the benefit of the decree. His prayer for substitution as plaintiff was allowed, despite objection by the appellant / defendant. The trial Court framed an issue, whether Smt. Parvati made a will in favour of Dalip Singh, for a limited purpose of deciding the application for being substituted as plaintiff and after recording the evidence of the parties, held that Smt. Parvati had executed a will in favour of Dalip Singh. This finding, recorded by the trial Court, was only for the limited purpose of substituting Dalip Singh as plaintiff in place of Smt. Parvati. The finding cannot be said to have been recorded in the suit nor could this finding affect merits of the suit.

15. However, when the matter was taken to the first appellate Court by appellant Suraj Ram against the initial decree, passed in the suit filed by late Smt. Parvati, based on the submissions of the learned counsel

for the parties, the first appellate Court framed a specific issue, whether Parvati had made any will in favour of Dalip Singh, respondent and if it was proved that she had made a will, what was the effect of that will on the suit, though there was no reference to this aspect of the matter, even remotely in the pleadings.

16. After the remand of the case, the trial Court recorded the evidence of both the parties. The two Courts below, after appreciating the evidence, have returned concurrent finding that Smt. Parvati made a will in favour of Dalip Singh and that that will was got registered by her with the Registrar of documents.

17. From the fact that both the sides led evidence qua the issue pertaining to the will, one thing is very clear that the parties knew that determination of this issue was vital to the decision of the case filed by Smt. Parvati, particularly after her death, because if it was proved that no will had been executed by her, the appellant / defendant Suraj Ram was to succeed to her share in the suit property on the basis of the law of inheritance. Further, the appellant / defendant neither objected to the framing of the issue, pertaining to the will, nor did he object to the determination of that issue by the trial Court or even by the first appellate Court and instead, he participated in the trial of the issue and his counsel argued for seeking the decision on the issue, favourable to him.

18. Not only this, even at the time of admission of the appeals, the appellant / defendant did not raise this point. In the grounds of appeal it was nowhere alleged that the issue, pertaining to the will, could not have been framed in the suit filed by Smt. Parvati, there being no pleadings to serve as the foundation for such issue and, therefore, the finding, recorded

by the two Courts below, was required to be ignored. On the contrary, among the substantial questions of law, formulated by his counsel and submitted to the Court along-with the memorandum of appeal, there was a question that the execution of the will was shrouded by suspicious circumstances and, therefore, the finding recorded by the two Courts below that the will was validly executed, was bad and needed to be reversed.

19. The above stated factual position apart, though it is true that the general principle, as observed by the Hon'ble Supreme Court in **Trojan and Co. Ltd. v. Rm. N.N. Nagappa Chettiar**, (AIR 1953 SC 235), is that the decision of a case cannot be based on the grounds outside the pleadings of the parties and it is the case pleaded that has to be found, a Constitution Bench of the Hon'ble Supreme Court in **Bhagwati Prasad vs. Chandramaul**, (AIR 1966 SC 735) has held that where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings, would be purely formal and technical and cannot succeed in every case. It was further held that what the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it?

20. In the present case, as noticed here-in-above, a specific issue about the will was framed and both the parties were not only afforded due opportunity to lead evidence, but they also led the entire evidence they intended to produce and, therefore, the ratio of the judgment of Constitution Bench in Bhagwati Prasad's case (supra) is squarely applicable.

21. The matter can be approached from another angle. The suit was filed by Smt. Parvati. The relief, which she had claimed, had no relevance to the question as to who was to succeed to her estate and, therefore, she was not supposed to plead that she had made any will in favour of Dalip Singh, respondent. It was only after her death that the question assumed significance and became relevant, because if Smt. Parvati had died intestate, cause of action would have come to an end with her death, as the appellant / defendant Suraj Ram, who disputed her title to the suit property, was to inherit the property according to the law of the land. Dalip Singh approached the Court on the death of Smt. Parvati, for being substituted as plaintiff, claiming that a will had been executed in his favour by Smt. Parvati. The prayer made by him was opposed and it was denied that Smt. Parvati executed any will in his favour. The trial Court recorded the evidence of the parties and decided Dalip Singh's application for his substitution as plaintiff in his favour. It was thus after the death of Smt. Parvati that the question, as to who would be succeeding to her estate, became relevant. The question was raised in writing, though not in the pleadings yet in the application, under Order 22 Rule 3 of the Code of Civil Procedure, and the reply thereto and, therefore, it cannot be said that the issue, that was framed by the appellate Court, while reversing an initial decree passed in the suit, was just in the air, as submitted by the learned counsel for the appellant.

22. For the foregoing reasons, the aforesaid contention of the learned counsel for the appellant, which was formulated into an additional question during the course of hearing of the appeal, is rejected.

23. One of the questions, on which the appeals were admitted, pertain to the validity of the will, executed by late Smt. Parvati in favour of Dalip Singh. As already noticed, when an additional issue was framed by the first appellate Court and the matter was remanded, the parties led evidence qua that issue. The plaintiff examined the Registrar of documents, namely Nirmal Singh (PW-2) and one of the attesting witnesses of the will, namely PW-3 Kishan Chand, to prove the execution of the will. The other attesting witness of the will had by then died. PW-2 Nirmal Singh stated that the will was presented to him for registration and that he read out and explained the contents of the will to the testatrix, who was in good health, both physical and mental, and that she admitted the contents of the will to be correct and then put her thumb impression in his presence and thereafter the attesting witnesses also put their signatures in his presence. He stated that thereafter he affixed the endorsement of registration and signed that endorsement.

24. PW-3 Kishan Chand, one of the marginal witnesses, stated that the will Ext. A-1 was scribed at the instance of Smt. Parvati Devi in favour of Dalip Singh and that after it was reduced into writing, its contents were read over and explained to her by the scribe and she admitted the same to be correct and then put her thumb impression. He further stated that thereafter the Lumbardar, the other attesting witness of the will, put his signature and after that he signed the will as the second witness. He proved his signatures on the will. There appears to be no reason to disbelieve the testimony of these two witnesses.

25. The defendant himself appeared as DW-1 and stated that Smt. Parvati had not been in good mental state for three – four years before

her death. The will was executed in the year 1980. Smt. Parvati died in the year 1985. If that is so, the testimony of the witness that the testatrix was not enjoying good mental health for three – four years before her death, even if the same be assumed to be correct, is of no relevance, because the will was executed by Smt. Parvati about five years prior to her death. Otherwise also, the statement cannot be taken to be true, because no medical evidence in support of the allegation has been led. DW-4 Burdu Ram and DW-5 Sohi Ram stated that for two to two-and-a-half years before her death, Smt. Parvati did not enjoy good mental health. For the very reason for which the testimony of appellant has been held to be irrelevant, the testimony of these two witnesses is also rejected. No suspicious circumstance, shrouding the execution of the will, was pointed out by the learned counsel for the appellant during the course of hearing of the appeal.

26. For the foregoing reasons, the finding of the two Courts below that Smt. Parvati executed a valid will in favour of respondent Dalip Singh, calls for no interference.

27. Learned counsel for the appellant did not make any submission with regard to the question pertaining to the inalienability of the property by will, on account of its being ancestral, or the question that the parties were governed by custom in the matter of succession and the custom barred the making of will of the ancestral property. So these questions are answered against the appellant / defendant.

28. Learned counsel for the appellant laid much stress upon the compromise Ext. D-2, which was entered between the father of the appellant and late Smt. Parvati on 19.11.1927, in support of his contention that Smt. Parvati had ceased to be the owner of her entire recorded share

in the suit property or at-least to that extent of her share in the suit property, which she had relinquished in favour of the father of the appellant / defendant.

29. A reading of Ext. D-2 shows that Smt. Parvati had filed a suit for separation of her share in the suit property by partition. It was acknowledged that Smt. Parvati was in possession of 40 Kanals (five Ghumaons) of land. She owed some debts to unnamed creditors. She surrendered sixteen Kanals (two Ghumaons) of land in her possession to Ram Dayal, father of the appellant / defendant, on the latter's undertaking to pay off her debts out of the income of those sixteen Kanals of land. The remaining 24 Kanals (three Ghumaons) of land was to remain in possession of Smt. Parvati, but she was to hold it only for life. She could not alienate that land nor could she create any charge thereon, according to Ext. D-2. On the death of either of the two signatories to the compromise, i.e. Ram Dayal, father of the appellant / defendant and Smt. Parvati, deceased plaintiff, the survivor was to inherit the property, i.e. the entire half share of Smt. Parvati. Admittedly, Ram Dayal predeceased Smt. Parvati.

30. Learned counsel for the appellant urged that Smt. Parvati had relinquished the ownership of at-least two Ghumaons of land in favour of Ram Dayal, vide compromise Ext. D-2 and, therefore, she was not in possession of that two Ghumaons of land on the date of enforcement of the Hindu Succession Act and, therefore, her life estate in respect of those two Ghumaons of land did not convert into full ownership by virtue of Section 14(1) of the Succession Act.

31. The argument has been stated only to be rejected. As already noticed, the compromise provided that on the death of either of the

signatories to the compromise, the survivor would inherit his / her part of the property. Admittedly, Ram Dayal, father of the appellant, predeceased Smt. Parvati and, therefore, even if the contention of the learned counsel for the appellant that Smt. Parvati had relinquished sixteen Kanals of land in favour of Ram Dayal, is accepted, the said land reverted to Smt. Parvati, she having survived Ram Dayal. Otherwise also, the contention that Smt. Parvati relinquished sixteen Kanals of land in favour of Ram Dayal, is not correct. A reading of the compromise Ext. D-2 shows that Smt. Parvati did not relinquish her interest in the sixteen Kanals of land in favour of Ram Dayal but simply delivered its possession to him for paying off her debts out of the income of that land. The necessary implication of this arrangement is that after the payment of the debts, the land was to revert to Smt. Parvati.

32. It was also contended by the learned for the appellant that since life interest was created in favour of Smt. Parvati, vide writing Ext. D-2, the matter was covered by sub-section (2) of Section 14 of the Hindu Succession Act, which serves as an exception to sub-section (1) of Section 14 of the Act. The argument has no merit at all. A reading of Ext. D-2 shows that Smt. Parvati was already having possession of forty Kanals of land, when the compromise was arrived at. She got this land by way of inheritance from her husband Khalela. Entries were also there in her favour in the revenue papers. She filed a case for separation of her share by partition. It was in the course of the proceedings of that case that the compromise was arrived at. Smt. Parvati did not acquire the property, in question, under the compromise. She was already having it.

33. No other point was urged.

34. As a result of the above discussion, both the appeals are dismissed.

June 6, 2006 (BC) **(Surjit Singh)**
Judge